No. 15365

IN THE

United States Court of Appeals

For the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Respondent.

BRIEF OF APPELLANT

CLAUDE V. MARCUS
Boise, Idaho
BLAINE F. EVANS
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GRANT C. AADNESEN
Salt Lake City, Utah
Counsel for Appellant

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Liability for the acts of another under the rule of respondent superior attaches only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and person sought to be charged with liability for the wrong, at the time of the injury and in respect of the very transaction out of which his injury arose.

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The written Contract between Rocky Mountain Oil Corporation and Shell Oil Company is clear and

unambiguous in its terms and therefore the construction of the contract was a question of law for the court and it was error to submit such question to jury determination.

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The instructions given by the trial court were erroneous and prejudicial. There was no evidence showing that Shell Oil Company and Rocky Mountain Oil Corporation were engaged in a joint venture and submitting that and other questions to the jury was error.

POINT 6

The court committed error in the rejection and admission of evidence submitted in the trial of this case.

TABLE OF CASES

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action is between citizens of different states involving more than $3,000.00, filed in the United States District Court for the District of Idaho, Eastern Division, and therefore within the jurisdiction of said court. Under the provisions of Section 1332, Title 28, U.S.C.A., the instant appeal is taken from a final judgment entered in said court and therefore within the jurisdiction of this court under the provisions of Section 1291, Title 28, U.S.C.A.

The complaint of the Plaintiff was filed in the Dis-

trict Court on January 6, 1955. Appellant, Shell Oil Company, a Corporation; Rocky Mountain Oil Corporation, a Corporation; and Stony Point Development, Inc., a Corporation, were named as defendants. Subsequently Stony Point Development, Inc. was dismissed from the action by stipulation. Judgment in the case has become final as against Rocky Mountain Oil Corporation and said corporation is not a party to this appeal. Hereinafter Shell Oil Corporation will be referred to as "Shell," and Rocky Mountain Oil Corporation will be referred to as "Rocky Mountain."

In this case the plaintiff sued to recover damages for personal injuries allegedly suffered by the Plaintiff on or about June 1, 1954, at an oil well drilling site near Montpelier in Bear Lake County, Idaho. At that time the Rocky Mountain Oil Corporation was conducting such drilling operations at said site located in Lot 2, Section 30 Township 12 South, Range 46 East B. M. in Bear Lake County, Idaho. The Plaintiff, accompanied by a companion, allegedly left Montpelier, Idaho, early on the morning of June 1, 1954 and drove to the drilling site to inquire about employment, arriving before work had started on the morning shift. The employees of Rocky Mountain who were at the job site had started a warming fire near the operation for the purpose of warming themselves before beginning work. Plaintiff and his companion approached the fire and stood close to it. At that time an employee of Rocky Mountain picked up a can of diesel oil and poured some on the burning fire. This apparently resulted in fire being splashed

on the Plaintiff who allegedly suffered burns which resulted in his action for damages.

The drilling site of these operations was located on government land and had originally been leased from the government under an oil and gas lease by one Ragner Barhaug on February 1, 1949. On January 11, 1951, Barhaug assigned his lease to Shell Oil Company. The Barhaug lease is Plaintiff's Exhibit 10 of the record in this case. On December 26, 1952, Shell entered into a "farm out" agreement with Wheeler and Gray, a partnership, under the terms of which Wheeler and Gray contracted to drill a well on said Lot 2, Section 30, Township 12 South, Range 46 East B. M. The Wheeler and Gray agreement with Shell is Plaintiff's Exhibit 11 of the record in this case. On March 6, 1953, Wheeler and Gray assigned their contract with Shell to Rocky Mountain Oil Corporation, and on July 15, 1953, Shell recognized such assignment and executed an assignment and agreement with Rocky Mountain under the terms of which Rocky Mountain assumed the Wheeler and Gray contract to drill said well. Rocky Mountain was engaged in drilling such well at the time of the alleged occurrence which gave rise to this action.

Through failure to pay the rent on said Lot 2 the lease on this property with the government expired February 1, 1954 and thereafter the property was open to lease by other persons and one G. W. Anderson, on April 29, 1954, obtained a lease covering this property. After obtaining such lease the said G. W. Anderson assigned his lease to Rocky Mountain. The

accident, which is the basis for this suit, occurred June 1, 1954, and on June 11, 1954, Rocky Mountain in writing agreed that the lease obtained from G. W. Anderson was subject to the drilling contract which Rocky Mountain had with Shell. This confirmation is Exhibit C attached to Plaintiff's Exhibit 9 of the record in this case.

At the time of the accident the oil well drilling was being carried on exclusively by Rocky Mountain with materials and labor entirely supplied and controlled by Rocky Mountain. Under the terms of the "farm out" agreement between Shell and Rocky Mountain, Shell was obligated to pay Rocky Mountain a fixed amount of "dry hole" money if the well was not productive and had the right to obtain samples as the drilling progressed. The evidence showed that such agreement was usual and ordinary in this industry and there was no evidence showing any modification of such agreement or control by Shell of such drilling operations. The evidence showed that the only acts of Shell with reference to said drilling operations were covered by the terms of the contract between Rocky Mountain and Shell. There was no evidence showing, no contention made by Plaintiff, and no instruction by the court that the contract between Shell and Rocky Mountain was uncertain or ambiguous. Such contract as above identified is before this court for examination.

The evidence also showed that no employee of Shell was even present at the drilling operations until the morning when the accident occurred. At that time

Mr. Loren McIntyre, a geologist for Shell, had gone to the drilling site to await the start of work for the purpose of obtaining drill samples and making a report on them to his employer, the Shell Oil Company.

For some days after the occurrence the geologist employed by Shell visited the drilling site at different times to obtain drilling samples and make reports. It is submitted that the evidence clearly shows that he had nothing to do with the operation except to pick up samples and make his reports to Shell. The evidence also showed that Shell and Rocky Mountain were proceeding upon the basis of Rocky Mountain being an independent contractor and, as Judge Clark pointed out in his Order vacating the first judgment entered against Shell, which is hereinafter set out in its entirety, neither Rocky Mountain nor Shell ever intended that this was a joint venture or any arrangement other than an independent contract. Accordingly, it is and has always been the position of Shell that Shell is in no way liable for the negligence, if any, of the employee of Rocky Mountain who caused the injury to Plaintiff. Plaintiff at all times knew and relied upon the fact that Rocky Mountain was carrying on the well drilling operations. This is shown in the testimony of the Plaintiff (R. 124).

"Q. And at that time you did know who these men were working for, did you?

A. Well, like I say, I thought they were working for Rocky Mountain Oil Company. I am pretty sure they were.

Q. Was that the company that was carrying on

the drilling operations out there, Mr. Prestidge?

A. So far as I know it is, yes.

Q. And you were aware of that at the time you contacted these men and at the time you went out to the drill site?

A. Yes, sir."

The first trial of this case was held October 3 and 4, 1955, with Judge Chase Clark presiding. The trial court refused to dismiss the action against Shell and submitted the question of liability and the questions concerning the relationship between Shell and Rocky Mountain to the jury. The jury returned a verdict against Shell and Rocky Mountain in the amount of $53,934.53. Following the entry of judgment Shell made Motion for Judgment in Accordance with Motion for Directed Verdict. On March 8, 1956, the trial court, speaking through Judge Clark, granted the Motion and entered its Order. Since the Order so directly discusses the issue involved in this case, we herewith set it out verbatim.

"This matter is before the Court at this time on defendant Shell Oil Company's Motion to set aside the Judgment and enter Verdict in accordance with its motion for directed verdict, duly made; and in lieu thereof a motion for a new trial. Briefs have been filed and the Court has fully considered the same.

The matters alleged as error here, with which the court is primarily concerned, are those numbered (3) and (4) in the motion, dealing with the failure of the Court to instruct as a matter of law with re-

spect to the relationship of the Shell Oil Company and Rocky Mountain Oil Corporation, and the alleged error of the court in instructing the jury with reference to joint enterprise, principal and agent and master and servant; Shell Oil Company contending that the evidence was totally insufficient to show any such relationship between Shell Oil Company and the other defendant.

At the time of the trial of this case, before the jury, the questions presented by this Motion were presented to the Court on Defendant's Motion for Directed Verdict. It was the court's opinion at that time that, rather than prolong the trial by going into an involved study of the points concerned, it should rule without delay, keeping in mind its right to rule on a motion such as this after due consideration and deliberation. This the Court has now done.

Where facts are in dispute as to what the relation is between parties concerned, that determination must be left to the jury; but where that question is to be determined through contracts and agreements, as in the instant case, the relationship of the parties should ordinarily be found by the court.

The Court is of the opinion that the paper filed with the Bureau of Land Management was not effective to make Rocky Mountain Oil Corporation an agent of the Shell Oil Company in all particulars, but was only for the express purposes therein stated.

As to whether a joint adventure existed, we must look to the contracts, the intentions of the parties and all the other attendant circumstances.

'It is impossible to define the relationship of joint adventure with exactitude and precision. In many respects it is analogous to a partnership, the main difference being that a joint adventure is more limited in its scope of operation than a partnership. In the main, some of the relevant facts of a joint adventure are that there must be joint interest in the property; there must be an agreement, express or implied, to share in the profits and losses from the venture; there must be action and conduct showing cooperation in the property. It has been held that it is not absolutely necessary that there be participation in both profits and losses. While it is possible to lay down the general characteristics of a joint adventure, in the end, whether a certain transaction constitutes such a relationship can be determined only from a full consideration of all the relevant facts and circumstances in each particular case.' (Kasishke vs. Baker, 146 F. 2d 113, at 115.)

Here there was no control over the well drilling by Shell Oil; while interested in the outcome, it was not concerned with methods or means employed. Certainly it does not appear that either party intended this as a joint venture. There was no participation in profits and losses. The agreement provides that all costs incurred by the drillers of any nature were to be borne by them. In case of a dry hole they were to be paid a definite sum per foot of depth of the hole. In case the well was a success there was a provision for a royalty fee. After due consideration, the Court

feels that under the contracts, agreements and assignments involved herein and the somewhat lengthy and, in some respects, detailed provisions thereof, the relationship was one of independent contractor.

For these reasons the Court feels, without going into the other matters alleged as error, that it should grant the Motion of Shell Oil Company for Judgment in Accordance with the Motion for a Directed Verdict, and

It is so ORDERED.

Dated this 8th day of March, 1956.

s/ Chase A. Clark
Chief Judge, United States
District Court, District of Idaho.

The judgment will stand as against the Rocky Mountain Oil Corporation."

Thereafter on March 23, 1956, the court vacated the judgment as against Shell. Subsequent thereto the Plaintiff moved for a new trial as against Shell on the basis of allegedly newly discovered evidence. This motion was based upon the affidavit of Mr. Coughlan, attorney for Plaintiff; Edmund W. Windolph, and Clarence S. Robinson who claimed they would give new evidence if a new trial were granted. Based upon such showing, and over the objections of Shell, the trial court granted the motion for new trial. The second trial of the case was held May 24, 1956, before the court and jury with Judge Fred M. Taylor presiding instead of Judge Chase Clark, who presided at the first trial. It is submitted that the

claimed evidence of Mr. Windolph and Mr. Robinson did not materialize at the second trial. Mr. Robinson did not testify and instead of bearing out his affidavit conclusion that Shell was in charge of the drilling operations, the testimony of Mr. Windolph, who was in charge of the drilling for Rocky Mountain, conclusively rebutted such conclusion. His testimony (R. 156) is as follows:

"Q. In other words, you received no instructions, did you, from the geologist; you received requests, is that right?

A. Yes, I imagine that is about right, yes.

Q. It is your understanding is it, that so far as this particular job was concerned, Mr. McIntyre had no authority over you in the drilling of that well?

A. That is right.

Q. When you used the statement you relied upon the geologist, isn't it true you meant by that that you expected he would collect his samples and analyze them?

A. Yes, and inform us.

Q. So far as the drilling of that well was concerned, the mechanical aspect of it, and the actual drilling of that well, that was your responsibility; wasn't it?

A. Yes.

Q. And you were the supervisor and had complete control and authority?

A. Yes."

Despite the order of, and conclusion of Judge Chase Clark vacating the judgment against Shell, the trial court at the second trial repeated the error of Judge Clark in the first trial by refusing to instruct the jury on the legal effect of the contract between Rocky Mountain and Shell and the legal relationship created under such contract and again submitted those questions and the question of liability of Shell to jury determination. The first judgment against Rocky Mountain had become final but the form of verdict submitted to the jury at the second trial listed all three companies as defendants. The jury returned a verdict of $10,000.00 and judgment for this amount was entered against Shell on May 28, 1956. Again Shell moved for Judgment in Accordance with Motion for Directed Verdict. This motion was denied and the instant appeal has been taken by Shell.

SPECIFICATION OF ERRORS

Appellant urges the following errors preserved in its "Statement of Points upon which Appellant intends to Rely on Appeal."

1. The error of the trial court in refusing to grant the motion to dismiss made by appellant prior to the trial and in refusing to grant the motion for directed verdict made by appellant at the close of evidence in the first trial of this cause and refusal to grant the motion for directed verdict made by this appellant at the close of the evidence at the second trial.

2. The error of the trial court in refusing to grant the motion for directed verdict of this appellant.

3. Error of the court in granting the motion of Plaintiff for new trial based on newly discovered evidence after the trial court had granted the motion of this appellant for judgment notwithstanding the verdict after the first trial.

4. The instructions of the trial court with reference to joint enterprise, principal and agent and master and servant given on both trials of this cause.

5. The error of the trial court in failing to give instructions requested by this appellant and especially in failing to instruct the jury as a matter of law with respect to the relationship of the Shell Oil Company and the Rocky Mountain Oil Corporation and the error of the court in submitting such questions to the jury.

6. The error of the court in the admission and exclusion of evidence with respect to the work performed by the geologist for the Shell Oil Company.

7. The error of the trial court in allowing interrogatories and admissions and answers thereto read in evidence.

8. The error of the trial court in the instructions given with respect to the relationship of appellant and the other named defendants to this said action.

9. The error of the court in refusing to grant the motion of this appellant for judgment in accordance with motion for directed verdict or for new trial.

10. The error of the trial court in refusing to dismiss the action as against the appellant, the refusal to grant the motion for directed verdict, and the error of the court in refusing to grant the motion of

appellant for judgment in accordance with motion for directed verdict or for new trial.

POINTS OF ARGUMENT

POINT 1

In this case the plaintiff had the duty of proving Shell responsible for the negligence, if any, of the employee of Rocky Mountain.

AUTHORITIES

Whalen vs. Zinn, 60 Idaho 722, 96 Pac. 2d 434.

Hayward vs. Yost, 72 Idaho 415, 242 Pac. 2d 971.

ARGUMENT

In this case the plaintiff claimed that Shell was responsible for the negligence of Mr. Doman, employee of Rocky Mountain. Admittedly the work at the drilling site was being carried on by Rocky Mountain with materials and labor which it supplied at its expense and over which it exercised complete and absolute control. The evidence showed that Shell exercised no control over the manner or means of doing the drilling work and that Rocky Mountain had even changed the drilling site from that originally specified. There was no evidence showing modification or variance in the relationship of Rocky Mountain and Shell from the terms of the written contract between these companies. Both of the contracting parties proceeded upon the basis of this being an independent contract arrangement and Rocky Mountain being an

independent contractor. Neither party intended otherwise. The contract was an ordinary one in the industry, free from ambiguity.

The statement of the court in Whalen vs. Zinn, supra, that

> "having predicated his action on the negligence of Fite, while acting as agent of respondent, the burden of proof was on appellant to establish the agency," and
>
> "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.
>
> The evidence shows Fite was the employee of Hahn, not of respondent; that it is common practice among wholesale and retail dealers in the plumbing and heating trade for the retailer to purchase supplies from the wholesaler, and should the wholesaler be called on to have work done on the goods in order to meet the requirements of the retailer's customer, an extra charge, in addition to the wholesale price, will be made therefor; that an extra charge was made in this case for cutting and threading the pipe. It is clear that in doing this cutting and threading Fite was acting as the employee of Hahn. There is nothing in the record to show respondent had, or sought to exercise, any authority over Fite, or over Hahn's shop, tools or machinery,"

is equally applicable in the instant case. Rather than showing liability on the part of Shell, the evidence clearly disproved liability. The trial court committed error in not dismissing the action against Shell.

POINT 2

In the performance of the oil well drilling operation under contract with Shell, Rocky Mountain was an independent contractor and therefore Shell was not liable for the acts of the employee of Rocky Mountain.

AUTHORITIES

A. J. Thegpin vs. Midland Oil Co. (CCA 8th) 4F. 2d 85, 273 U.S. 658.

Shell Oil Company vs. Richter (Cal.), 125 Pac. 2d 930.

Moreland vs. Mason, 45 Idaho 143, 260 Pac. 1035.

27 Am. Jur. Independent Contractors, Sec. 6 through 25.

27 Am. Jur. Sec. 17 p. 488 through 499.

Joslyn vs. Idaho Times Publishing Co., 56 Idaho 342, 53 Pac. 2d 323.

Re: General Electric Co., 66 Idaho 91, 156 Pac. 2d 190.

Hartburg vs. Interstate Engineering Co., 58 Idaho 437, 75 Pac. 2d 997.

Penson vs. Minidoka Highway District, 61 Idaho 731, 106 Pac. 2d 1020.

Laub vs. Meyer, 70 Idaho 224, 214 Pac. 2d 884.

Horst vs. Southern Idaho Oil Co., 49 Idaho 58, 286 Pac. 369.

Ohm vs. J. R. Simplot Co., 70 Idaho 318, 216 Pac. 2d 952.

Gregg vs. Cook Cedar Co., 64 Idaho 50, 127 Pac. 2d 757.

Moore vs. Phillips (Ark.), 120 S.W. 2d 722.

Arkansas & Louisiana Gas Co. vs. Tuggle (Ark.) 145 S.W. 2d 154.

McFadden vs. Penzoil (Pa.), 9 A. 2d 412.

Seismic Exploration vs. Dobray, (Tex.) 169 S. W. 2d 739.

Taylor vs. Blackwell Lumber Co., 37 Idaho 707, 218 Pac. 356.

E. T. Chapin Co. vs. Scott, 44 Idaho 566, 260 Pac. 172.

Snyder vs. Southern California Addition Co. (Cal.), 276 Pac. 2d 638.

ARGUMENT

The contract terms between Shell and Rocky Mountain determine the relationship of the two companies. Shell was the holder of the lease on this particular land under contract and agreed to turn over the lease on said land in return for which Rocky Mountain agreed to drill the exploratory well. Such "farm out" contracts are usual and ordinary in the industry. The agreement contained terms agreed upon by the two companies dealing at arms length.

Neither company had an interest in the other; they were completely separate organizations and so contracted.

As pointed out in 27 Am. Jur., Independent Contractor, Sections 6-25, the pertinent tests in determining whether the relationship is that of principal and agent or independent contractor are:

(a) Control of the premises.

(b) Control of the terms of work to be performed.

(c) Control of the workmen.

(d) Which party furnishes the workmen, materials, and appliances to do the work.

(e) The measure of compensation and method and time of payment.

(f) By whom the workmen are paid.

(g) Whether the work is performed by a party engaged in such occupation or type of work.

(h) Whether the work requires special skill.

(i) The right to hire workmen to perform such work.

With reference to the nature of the work being done, persons acting in the capacity of certain occupations, such as lessors and lessees, are generally regarded as independent contractors.

27 Am. Jur. Independent Contractors, p. 498-499.

A party placed in possession of property held under an oil and gas lease under a contract providing for assignment of the lease when he completed a well

on the property is a tenant in possession with substantially the same relationship to the premises as though there had been an absolute assignment of the lease. An assignor under such circumstances is not liable for the negligence of the assignee in possession. Upon such assignment and entry to possession by the assignee, the duty and liability of the original lessee assignor to third persons are no greater than that of a landlord.

A. J. Thegpen vs. Midland Oil Co. (CCA 8th) 4 F. 2d 85, Writ of Error dismissed, 273 U.S. 658.

An oil lessor is not liable to third persons for the torts of his lessee.

Shell Oil Co. vs. Richter (Cal.) 125 Pac. 2d 930.

With reference to the control of details of work to be performed, it is pointed out in 27 Am. Jur. p. 488, that:

"In weighing the control exercised, however, authoritative control must be carefully distinguished from mere suggestion as to detail or necessary cooperation as where the work furnished is part of a larger undertaking. As a practical proposition, every contract for work to be done reserves to the employer a certain degree of control, at least to enable him to see that the contract is performed according to specifications."

"The mere retention by the owner of the right to inspect work of an independent contractor as it

progresses for the purpose of determining whether it is completed according to plans and specifications does not operate to create the relationship of master and servant between the owner and those engaged in the work."

The fact that the contractor employs, pays and has full power to control the workmen is virtually decisive of his independence and the fact that he does not have the control of the workmen is entitled to consideration as showing his lack of independence.

27 Am. Jur. 492.

An independent contractor is one who renders service in the course of an occupation representing the will of the employer only as to the results of the work and not as to the means by which it is accomplished.

Moreland vs. Mason, 45 Idaho 143, 260 Pac. 1035.

"The relationship of master and servant exists whenever the employer retains the right to direct the manner in which business shall be done as well as the result to be accomplished. The fact that the work is to be done under the supervision of an architect or that the employer has the right to make alterations, deviations, additions and omissions from the contract, does not change the relationship from that of an independent contractor to that of a mere servant and a reservation by the

employer of the right to supervise the work for the purpose of merely determining whether it is being done in accordance with the contract does not affect the independence of the relationship. The fact that the work is to be done under the direction and to the satisfaction of certain persons representing the employer does not of itself render the person contracted with to do the work as a servant."

Joslin vs. Idaho Times Publishing Company, 56 Idaho 342, 53 Pac. 2d 323.

The test in determining whether a party is an independent contractor is the right to control and direct the activities of its employees and the power to control the details of the work to be performed.

Penson vs. Minidoka Highway District, 61 Idaho 731, 106 Pac. 2d 1020.

Even if the work is to be done to the satisfaction of representatives of the employer, this does not change the relationship from independent contractor.

Laub vs. Meyer, 70 Idaho 224, 214 Pac. 2d 884.
Horst vs. Southern Idaho Oil Company, 49 Idaho 58, 286 Pac. 369.

The most important tests are the right of control as to the method of doing the work contracted for, the power to discharge employees, and method of payment.

Ohm vs. J. R. Simplot Company, 70 Idaho 318, 216 Pac. 2d 952.

In the case of Gregg vs. Cook Cedar Company, 64 Idaho 50, 127 Pac. 2d 757, the parties had an oral agreement for the manufacture of cedar poles. The compensation to be paid was by piece dependent on size. The employer paid bills and advanced the necessary funds to carry on the work which was charged back to the contractor. The evidence showed that the Vice President of the employer directed the specific logs and method of manufacture of a portion of the poles contracted for. Despite such extensive control the court held an independent contractor relationship was established.

In the case of Hayward vs. Yost, 72 Idaho 415, 242 Pac. 2d 971, the Idaho Supreme Court quoted Section 250 of the Restatement of the Law of Agency by the American Law Institute with approval:

"Except as stated in Section 251 a principal is not liable for physical harm caused by the negligent physical conduct of an agent who is not a servant, during the performance of the principal's business, unless the act was done in the manner directed or authorized by the principal or the result was one intended or authorized by the principal," and

"A principal employing another to achieve a result but not controlling nor having the right to control the details of his physical movements is not responsible for incidental negligence while

such person is conducting the authorized transaction. In their movements and their control of physical forces, they are in the relation of independent contractors to the principal. It is only when to the relationship of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor."

When a defendant oil company entered into contract with another company for the construction of a refining unit at one of its plants on "cost plus" basis, which required defendant company to pay for labor and materials used by contracting company in addition to an engineering fee, the contract did not establish relationship of principal and agent between the two companies, but the contracting company was an independent contractor.

McFadden vs. Penzoil Company (Pa.), 9 A. 2d 412.

A petroleum company contracting with another corporation for reflection seismograph exploration was not liable for damage to land and buildings thereon because of vibration resulting from explosions of small dynamite charges by contractor in making seismograph tests no closer than 100 feet from such buildings as the contract did not contemplate blast-

ing operations of intrinsic dangerous work and the petroleum company did not control the method of doing the work.

Seismic Explorations vs. Dobray (Tex.), 169 S.W. 2d 379.

The right of discharge does not change the independent contractor relationship.

Tayor vs. Blackwell Lumber Company, 37 Idaho 707, 218 Pac. 356.

Nor does the method of payment defeat such relationship.

E. T. Chapin Co. vs. Scott, 44 Idaho 566, 260 Pac. 172.

The person contracting is not liable for the negligence of an independent contractor.

Snyder vs. Southern California Edison Company (Cal.), 276 Pac. 2d 638.

Rocky Mountain was an independent contractor in carrying on the drilling operations at the time the accident occurred, and Shell was not liable for the negligence of Rocky Mountain employees.

POINT 3

Liability for the acts of another under the rule of respondeat superior attaches only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and persons sought to be charged with liability for the wrong *at*

the time of the injury and in respect to the very transaction out of which the injury arose. (emphasis ours.)

AUTHORITIES

35 Am. Jur. 967-985.

Fuller Company vs. McCloskey, 228 U.S. 194, 57 L. ed. 795.

Standard Oil Company vs. Anderson 212 U.S. 215, 53 L. ed. 480.

Chicago RI & PR Company vs. Stepp (CCA 8th) 164 F. 785.

ARGUMENT

The record in this case shows that no employee of Shell had been around the drilling operations until Mr. McIntyre, a geologist working for Shell, went to the drilling site on the morning of the accident. At that time work had not started. Mr. McIntyre was not even acquainted with the operation at that time. If Shell is liable for the negligence of Mr. Doman, the employee of Rocky Mountain, because of control over the drilling operations such control and relationship had to exist at the time the accident occurred. The trial court failed to recognize this principle of law and allowed extensive testimony concerning the work of Mr. McIntyre, Shell Geologist, subsequent to the date of the accident. This ruling was brought out during the testimony of Mr. McIntyre. (R. 183):

"Q. And how frequent did you visit the drilling site?

Mr. Marcus: May I ask a question in aid of an objection?

The Court: Yes.

Mr. Marcus: Does this relate to periods of time subsequent to the date of this occurrence, Mr. Zener?

Mr. Zener: Yes.

Mr. Marcus: Object on the grounds it is incompetent.

The Court: Objection overruled."

Control of this job by Shell, if any existed subsequent to the date of the occurrence, was immaterial. Obviously it was impossible for Mr. McIntyre to have exercised any control whatever prior to and including the actual occurrence. The rule is correctly stated in Fuller Co. vs. McCloskey, supra,

"In order to recover it must be shown that the relation of master and servant existed between the parties sought to be held liable and the person doing the act complained of in reference to the very act complained of"

"One is liable for the acts of another under the rule of respondeat superior only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong at the time of the injury in respect of the very transaction out of which the injury arose."

35 Am. Jur. 985

POINT 4

The written contract between Rocky Mountain and Shell is clear and unambiguous in its terms and therefore the construction of the contract was a a question of law for the court and it was error to submit such question to jury determination.

AUTHORITIES

Whitson vs. Pacific Nash Motor Co. 47 Idaho 204, 215 Pac. 846.

Thornton vs. Budge, 74 Idaho 103, 257 Pac. 2d 238.

Goble vs. Boise Payette Lumber Co. 38 Idaho 525, 224 Pac. 439.

Horst vs. Southern Idaho Oil Co., 49 Idaho 58, 286 Pac. 639.

Harding vs. Home Investment and Savings Co., 49 Idaho 64, 297 Pac. 1101.

California Jewelry Co. vs. McDonald, 54 Idaho 248, 30 Pac. 2d 778.

O'Brien vs. Boston and Maine Railway (Mass.) 91 N. E. 2d 218. 17 C. JS. 129.

First National Bank vs. Cruickshank, 37 Idaho 789, 225 Pac. 142.

Molyneaux vs. Twin Falls Canal Co., 54 Idaho 619, 35 Pac. 2d. 3 C.J.S. 326.

Batt vs. San Diego Sun Publishing Co. (Cal.) 69. Pac. 2d 216.

Texas Co. vs. Brice (CCA 6th) 26 F. 2d 164.

Palugh vs. Van Duyn, 32 Idaho 767, 188 Pac. 945.

ARGUMENT

The above principle of law is too clear and certain to require extensive discussion. As stated by the court in Whitson vs. Pacific Nash Motor Company, 37 Idaho 204, 215 Pac. 945,

> "If a written contract, clear and unambiguous in its terms is relied upon by plaintiff to establish the relationship of principal and agent between defendant and another, the construction of such contract is for the court, and it is error to submit to the jury the question of whether or not such contract creates the relationship of principal and agent."

> "The general rule that the construction of a contract is a question of law for the court if the terms of the contract and the extrinsic facts which may affect its construction are free from dispute and this is true no matter how ambiguous or uncertain are its terms.

Copp vs. Van Hise (CCA 9th) 119 F. 2d 691.

> "The construction of the contract and its legal effect are questions of law for the court."

Pyke Rapids Power Company vs. Minneapolis-St. Paul Railway (CCA 8th) 99 F. 2d 902.

> "Where the terms of a contract are admitted and are not in conflict and are unaided by parol evidence their interpretation presents not a question of fact, but one of law."

Robin Quarries vs. Central Nebraska Public P & I Dist. 64 F. Supp. 200.

"In the instant case the question is inescapable that at the time of the accident in question here, Cottrell was performing duties assumed by him under his written contract with appellant and no other. That being so and the contract being free from ambiguity and clear in its terms, the interpretation put upon it and the relationship created by it between appellant and Cottrell becomes one of law alone for decision by a court unhampered by the implied findings of a jury."

Batt vs. San Diego Publishing Co. (Cal.) 69 Pac. 2d 216.

The case of Arkansas Fuel Oil Company vs. Scaletta (Ark.) 140 S. W. 2d 684 involved an action by plaintiff against the defendant and a service station operator for damages for personal injuries received in an automobile accident. Plaintiff offered in evidence several written contracts between the defendant oil company and the service station operator and also offered oral testimony as to the actual conduct of the parties under the agreements. The lower court submitted the question of whether the service station operator was an employee of the oil company or an independent contractor to the jury and the jury found in favor of the plaintiff. Upon appeal the judgment for plaintiff was reversed, the court holding that the construction of the written contracts was exclusively for the court and that the contracts showed an independent contractor relationship.

In considering whether the question of the rela-

tionship between the oil company and the service station operator was a matter for the court or for the jury, the appellate court said:

> "We cannot agree that the so-called restrictions had nothing to do with the means and method by which the filling station was operated. The governing distinction is that if the control of the work served by the employer is controlled not only as to the result, but also of the means, and the manner of the performance, then the relationship of master and servant necessarily follows, but if control of the means be lacking and if the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relationship of independent contractor exists."

There is no claim of ambiguity in the contract between Rocky Mountain and Shell, and the court had the duty to interpret it. After the first trial of this case the trial court recognized this correct principle of law and that it had been in error in not giving effect to it. Strangely the trial court in the second trial completely disregarded this correct principle of law and fell into the same error committed by the trial court in the first instance.

Shell and Rocky Mountain had no other agreement changing or modifying the contract. Neither party acted outside or in a manner contrary to the provisions of the contract and Shell did nothing except as provided and allowed under the contract terms. The

court had the duty to interpret the contract between Shell and Rocky Mountain and instruct the jury as to its legal meaning and effect, including the relationship it created between Shell and Rocky Mountain.

POINT 5

The instructions given by the trial court were erroneous and prejudicial. There was no evidence that Shell and Rocky Mountain were engaged in a joint adventure and submitting this and other questions to the jury was error.

AUTHORITIES

Hogge vs. Joy (Wyo.) 200 Pac. 96, 18 A.L.R. 469.

San Francisco Iron & Metal Co. vs. American M & I Co. (Cal.) 1 Pac. 2d 1008.

Garrison vs. Place (Ohio), 190 N.E. 2d 569.

Painter vs. Lingen, (Va.) 71 S. E 2d 355.

Shell Oil Co. vs. Richter (Cal.) 125 Pac. 2d 930.

Bowmaster vs. Carroll (CCA 8th) 23 F. 2d 825.

Balding vs. Camp (Tex.) 6 S. W. 2d 94.

Gottleib Brothers vs. Culbertson, (Wash.) 277 Pac. 447.

58 C.J.S. Sec. 251, pg. 709.

Spier vs. Lang (Cal.), 53 Pac. 2d 138.

Finn vs. Drtina (Wash.) 194 Pac. 2d 347.

Traretto vs. G. H. Hammond Co., 110 F. 2d 135.

Johnson vs. Murray Company, (Tex.) 90 S. W. 2d 920.

Snodgrass vs. Kelley, (Tex.) 141 S. W. 2d 381.
Grace vs. Tannehill, (CCA 5th) 54 F 2d 1059.
Luling Oil and Gas Co. vs. Humble Oil and Refining Co., 191 S. W. 2d 716.
Simms vs. Humble Oil and Refining Co., (Tex.) 252 S. W. 1083.
Roote vs. Tomberlin (Tex.) 36 S. W. 2d 596.
Siefert vs. Brown, (Tex.) 53 S. W. 2d 117.
Lowery Oil Corporation vs. Bennett, (Texas) 16 S. W. 2d 947.
Gardner vs. Wesner, (Tex.) 55 S. W. 2d 1104.
Donegan Tool and Supply Co. vs. Carroll, (Tex.) 60 SW. 2d 296.
Ruck vs. Burch, (Tex.) 156 S. W. 2d 975.
58 C.J.S. 709.

ARGUMENT

"There must be substantial evidence proving that parties intend to perform a joint venture before the question may be submitted to a jury."

Hogge vs. Joy (Wyo.) 200 Pac. 96;
San Francisco Iron & Metal Co. vs. American M & I Co. (Cal.) 1 Pac. 2d 1008.

"Proof of the essential elements of a joint venture is necessary before the proof may be submitted to a jury."

Garrison vs. Place (Ohio) 109 N. E 2d 569.

"The question of whether parties are engaged in a joint enterprise is for the court if the evidence is not in conflict."

Painter vs. Lingen (Va.), 71 S. E. 2d 355.

"A joint proprietary interest and a right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint adventure. Particularly is this true with respect to negligence cases in which the element of joint venture is present; in that class of cases unless each has some voice or right to be heard in the control or management of the enterprise a joint enterprise is not deemed to exist."

30 Am. Jur. 682.

Joint participation in the conduct of the business is an essential element of a joint venture.
Spier vs. Lang (Cal.) 53 Pac. 2d 138.

"As previously stated a joint adventure arises out of and must have its origin in a contract, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common job and in the objects and purposes of which they have a community interest, and further a contract *in which each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over the agencies used in the performance.*" (Emphasis ours)
Finn vs. Drtina, (Wash.) 194 Pac. 2d 347.

"A joint adventure is an association of persons to carry out a certain business enterprise for profit, for which purposes they combine their property, money, effects, skill and knowledge and each participant therein is an agent for each of the

others and *it is essential that each have control of the means employed to carry out the common purpose.*" (Emphasis ours)

Traretto vs. G. H. Hammond Co., 110 F. 2d 135.

The authorities uniformly hold that where the rental and consideration for a lease is based even upon compensation out of net profits or on percentage of shares of leased business, no joint enterprise or partnership is created but that only the element of landlord and tenant is created.

Johnson vs. Murray Company, (Tex.) 90 S. W 2d 920.

In Snodgrass vs. Kelley (Tex.), 141 S.W. 2d 381, the lessee assigned a portion of his undivided 7/8ths interest in a lease and then drilled a well, during which operation an employee was injured. The employee included the assignees in his action. The court stated:

"Appellant further contends that the appellees and Mitchell were joint owners of the leasehold estate and had agreed to jointly drill the well and were to share the profits from the production of oil, if any, and that the parties were mutual agents for each other. The question of mutual agency has little or no bearing on the issue of whether or not the partnership has been created. We are inclined to believe it is an incident that follows in the event the partnership was created rather than a fact

to consider in determining the existence of such partnership. We are also of the opinion that the evidence in this case fails to show a joint ownership of the leasehold estate. The assignments clearly show that each party owned an undivided interest in the estate, but there is no evidence to show that they were joint owners of any portion of such leasehold estate. This distinction is clear and material. We are also of the opinion that the evidence fails to show a mutual undertaking of the drilling operations. The evidence is undisputed that Mitchell had absolute control of all drilling operations. There is no evidence to show that the appellees contributed any labor, money or services toward the drilling of the well. As above stated, the only thing that they did was to purchase an undivided interest in the leasehold estate. We are also of the opinion that the evidence fails to show that any mutual sharing of profits was contemplated in Mitchell's drilling the well in question. Under the law as it now exists in this state each of the appellees was entitled to his undivided interest in the minerals and would also be entitled to the same if production was had. As cotenants they would be entitled to receive their portion of the production, but it does not necessarily follow that they were to share in any profits made by Mitchell out of his undivided interest, if any profits were made by him. The profits, if any, made by him out of his leasehold estate would be his profit, and not one that he would have to share with someone else."

In many of the authorities a joint venture is looked upon as a partnership for that particular project and in the case of Grace vs. Tannehill (CCA 5th) 54 F 2d 1059, the court pointed out that to establish such a partnership a definite understanding whether tacit or express must be shown with reasonable certainty by a clear preponderance of the evidence.

In Luling Oil and Gas Company vs. Humble Oil and Refining Company, 191 S. W2d 716, it was held that the relationship of partners, joint adventurers or mining partners being contractural in nature, whether such relationship exists depends upon the intention of the parties.

In Simms vs. Humble Oil and Refining Co., (Tex.) 252 SW. 1083, a contract had been entered into between assignee who had acquired part of an oil lease from lessee and defendant whereby defendant was to loan assignee certain casings to be placed in a development well of the assignee in consideration of 1/16th of any production realized from the well, such casing to be returned if the well was dry and the contract further provided that defendant was to have a lien on the casing in the well to secure the performance of the contract. The court held that this did not create a mining partnership.

To the same effect are Roote vs. Tomberlin, (Texas) 36 S. W. 2d 596; Seifert vs. Brown, (Tex.) 53 S. W2d 117; Lowery Oil Corporation vs. Bennett, (Tex.) 16 S. W2d 947; Gardner vs. Wesner, (Tex.) 55 S. W. 2d 1104; Donegan Tool & Supply Co. vs. Carroll (Tex.) 60 S. W. 2d 296.

In Ruck vs. Burch (Tex.) 156 S. W. 2d 975, the lessee assigned an undivided fractional interest in a lease and the plaintiff thereafter sued both the lessees and their assignees for rental value of a drilling rig. In holding that the assignees were not liable the court stated:

> "In this case under the above record we are confronted with this simple question. Did said parties constitute themselves partners with Jeans and Sheffield by merely taking an assignment to an undivided fractional interest in the above lease and of the personal property used in connection therewith. Under the circumstances above detailed I think that to ask this question is but to answer it in the negative. *It is settled as a law of this state that in order to constitute a mining partnership arising by operation of law there must not be only joint interest in the mining property, but joint operation thereof as well. Joint ownership without joint operation merely constitutes co-tenancy.*" (Emphasis ours.)

The above authorities indicate the principles to be applied in determining whether parties are engaged in a joint adventure and whether the question should be submitted to the jury. In the instant case, Judge Clark, at the first trial, submitted this question to the jury recognizing that the contract terms were clear, that the parties had proceeded entirely within the contract terms and that there was no modification or variance of that contract. After careful study

it was his considered opinion that this was error and as a result he made his order vacating the first judgment against Shell. Despite his considered opinion and order, the court at the second trial disregarded his conclusion and fell into the same error that he had committed in the first trial by again submitting this and other law questions to the jury.

The instructions given by the court were incomplete and misleading. There was no evidence which warranted the instructions on joint venture. As pointed out in the objections to the instruction, it did not instruct on the necessity of joint participation and common control by the parties. The instructions on independent contractors emphasized those elements which would disprove such relationship and omitted elements which would prove the independent relationship such as control of workmen, party paying the workmen, method and time of payment, the furnishing of materials and capital, and the differences between a controlled result and the control over the particular method and means of achieving that result. These errors of commission in the giving of the instructions were in addition to the error of the court in failing to construe and interpret the contract and determine the relationship between Rocky Mountain and Shell as a matter of law.

The evidence showed conclusively that Shell and Rocky Mountain were independent contracting parties. There was no sharing of either profits or losses; neither company had anything to do with the operations of the other; Rocky Mountain put its own

money in the drilling operations, furnished its own labor, hired such labor at wages which it fixed, determined when and how they were to be paid, without any right of Shell to govern or control them in any respect. Rocky Mountain furnished the equipment and materials for the drilling, the company was engaged in work in this field, determined the hours of work and when the drilling would commence and stop. Rocky Mountain even changed the location of the drilling site on the leased Lot 2. The contracting parties do not claim that a joint venture existed. The plaintiff in no way was misled. As shown in his testimony, Plaintiff knew that Shell was not drilling the well and knew that Rocky Mountain was drilling the well. He had sought employment from Rocky Mountain and as shown in the testimony of Dr. Rulon B. Lindsay (R. 170-171), the Plaintiff had informed the doctor that he was actually working for Rocky Mountain.

"Q. Did he later tell you what company he was working for, or had reported to work for?

A. Well, I think he called it the Rocky Mountain Drilling Company.

Q. Was it the Rocky Mountain Oil Corporation?

A. As near as I know, I can look at my records, because I had to get that history from him, and that is the Rocky Mountain Drilling Company."

Only for the purpose of this suit has the Plaintiff claimed that Shell was in any way responsible for

what happened to him on the morning of the accident.

The determination of the trial court to hold Shell in the case can only be explained by the fact that perhaps this type of "farm out" drilling agreement, though common in oil and gas producing areas, was somewhat strange to this court. If a party to such contract is to be held liable for the acts of the other then it is submitted that a like ruling could be made with respect to almost any type of contract. Every contract involves a controlled result to be achieved by the contracting parties. For example, a contract in which the buyer agrees to place certain improvements on the property or to maintain insurance on improvements could involve the same reasoning erroneously applied in this case. Rocky Mountain and Shell were independent contracting parties and the contract was being carried out by them in strict conformity to the contract terms. Shell, although interested in the results of the oil well drilling, had no control whatever over the performance of the work, details of the work, or of the means employed in carrying out the work. Shell was entitled to have the court construe the contract and a correct interpretation of the contract required the dismissal of this action against Shell.

POINT 6

The court committed error in the rejection and admission of evidence submitted in the trial of this case.

ARGUMENT

The court allowed the admission of answers to interrogatories given prior to the trial without requiring any foundation for the admission of this type of evidence. The rulings of the court are shown in the record beginning at page 200 and especially at pages 211-219. Objection was interposed to each and all of the answers to interrogatories as not being admissable primary evidence. The court allowed answers to all the questions to be admitted in evidence, which answers merely set forth the contract provisions of the agreement between Shell and Rocky Mountain. The obvious purpose of such evidence was to detail the different provisions of the contract to emphasize in the minds of the jury that Shell was the principal in the well drilling operations merely because of the number of provisions the contract contained. The court erroneously proceeded upon the basis that any such answers were admissable without a showing of relevancy or competency.

Attention is also called to the ruling of the court preventing the Defendant from submitting in evidence the written notes of Dr. Rulon B. Lindsay on his cross examination after he had waived the physician-patient privilege by testifying in behalf of the Plaintiff. The ruling of the court is shown in the record at page 173:

> "Mr. Marcus: We point out that on direct the Doctor had been referring to these instruments, and therefore I think we would be entitled to have

them put into evidence. They are the best evidence, of course.

The Court: You can cross-examine him on anything he referred to but they are his notes.

Objection sustained."

This ruling prevented a series of later questions pertaining to the doctor's written material and the ruling was obvious error.

CONCLUSION

The judgment of the trial court should be reversed and the action ordered dismissed as against Appellant.

Respectfully submitted.

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